

IN THE SUPREME COURT OF MISSOURI

No.: SC93853

ERIC WILLIAMS

Appellant

vs.

**WILLIAM L. HUBBARD, LIMITED ADMINISTRATOR AD
LITEM OF THE ESTATE OF BETTY MARGARET REYNOLDS
AND KENNETH NELSON AND SANDRA K.
NELSON, HUSBAND AND WIFE**

Respondents

On Transfer from the Missouri Court of Appeals Western District

Cause No: WD76023

**SUBSTITUTE BRIEF OF APPELLANT
ERIC WILLIAMS**

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JURISDICTIONAL STATEMENT

The Circuit Court of Jackson County, Missouri, entered summary judgment against appellant Eric Williams, holding that appellant did not have standing to pursue his claims for discovery of assets for the estate of Betty Reynolds, to set aside accounts acquired by undue influence, for legal malpractice, for breach of fiduciary duty and for imposition of a constructive trust against respondents. Because these issues do not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court, MO. CONST. Article V, Section 3, jurisdiction of the underlying appeal was in the Court of Appeals, Western District, section 477.070 RSMo.

The Court of Appeals, Western District reversed the trial court in part.

This Court granted transfer by its order of April 29, 2014.

STATEMENT OF FACTS

In 2000, Kenneth Nelson was retained by Betty Reynolds to prepare a will, a durable power of attorney, a durable power of attorney for health care and a living will declaration and medical care statement. This representation began sometime in March 2000 and involved substantial correspondence and communication between Betty Reynolds and Kenneth Nelson concerning Betty Reynolds' desire to change a prior will. (Defendant's S.O.F. 8, 9; L.F. 065,119,120).

There is no dispute about the nature and extent of Betty Reynolds' assets at the time the 2000 will was executed. There is also no dispute about how or when these funds were eventually retitled joint or payable on death to respondent Sandra Nelson, and the various dates of the several account transfers. A fair and accurate summary of this is set forth in defendants' statement of uncontroverted facts. (Defendants S.O.F. 10 through 26; L.F. 065-068).

In early 2000, Betty Reynolds furnished Kenneth Nelson a questionnaire which indicated all of her valuable assets, being certificates of deposit and savings accounts at KCPCU, were held jointly with Louise Baughman and Norma Lamp (mother of respondent herein Sandra Nelson and mother-in-law of respondent Kenneth Nelson). (Plaintiff's S.O.F. 62, 63, 64, 65; L.F. 375, 376, 135).

The questionnaire also indicated she owned two brokerage accounts with American Century and an AARP Scudder account, all held as joint tenants. (Defendants S.O. F. 14, 15, 18; L.F. 066, 067, 137)

The 2000 will was executed on or about May 30, 2000. The provisions of the

2000 will left her entire estate to E. Louise Baughman, Norma J. Lamp (mother-in-law of Kenneth Nelson and mother of Sandra Nelson) and Eric D. Williams, appellant herein, in equal shares. (Plaintiff's S.O.F. 67; L.F. 376, 149, 151, 180).

Had Betty Reynolds died while the 2000 will was in effect, the will would have only applied to untitled personal property, stated by Betty to be worth less than \$5,000.00. (Ken Nelson 2000 estate planning documents, L.F. 513). The balance of her assets, estimated by Betty to be worth \$431,000.00, would have passed to Louise Baughman, except for approximately \$27,000.00 that would have passed to Norma Lamp by POD or joint tenancy designations on the financial assets. (Defendant's S.O.F. 10, 11, 12, 13; L.F. 065).

Except for a UMB checking account opened June 6, 2005, the beneficiary or joint ownership designations on these accounts remained unchanged until after Betty Reynolds executed her 2006 will on June 28, 2006. (Defendants S.O.F. 17-26; L.F. 066, 067, 068).

On June 16, 2006, Betty Reynolds wrote Ken Nelson a letter that reflected a telephone conversation of June 6, 2006. (Plaintiff's S.O.F. 71; L.F. 377, 549). She wanted his suggestions, opinions and advice, as well as his help, to prepare a new will and power of attorney. (L.F. 549). Her instructions were that the beneficiaries in the new will would be Sandra K. Nelson and Eric D. Williams to share equally. (Plaintiff's S.O.F. 71; L.F. 377, 549). Betty's instructions also made sure that Kenneth Nelson knew Eric William's current address and telephone number. (Plaintiff's S.O.F. 73; L.F. 377, 551).

During the 2006 representation, Kenneth Nelson indicated Betty Reynolds did not

volunteer any update concerning the status of ownership of her accounts and investments. He did not ask, and the “topic did not come up.” (Plaintiff’s S.O.F. 74; L.F. 378, 448).

The 2006 will was executed June 28, 2006 which designated Sandra Nelson and Eric Williams equally, to share all of Betty Reynolds property. (Plaintiff’s S.O.F. 79, L.F. 378, 011). The accounts and investments were still held jointly with Louise Baughman and Norma Lamp. The accounts had remained that way since before the 2000 representation. (Defendants S.O.F. 11 -26; L.F. 065).

When Betty Reynolds died April 28, 2010, her lawyer’s wife, Sandra Nelson, was the surviving beneficiary on all of her cash and investments worth \$456,455.00. (Defendants S.O.F. 26, L.F. 068).

The cash and investments on the date of Betty Reynolds’ death are summarized as follows:

1. UMB Certificate of Deposit #1471864131 - \$202,916.99 (Payable on death Sandra Nelson)
2. UMB Certificate of Deposit #10762641310 - \$118,684.86 (Jointly owned Sandra Nelson)
3. UMB Certificate of Deposit #15295951310 - \$41,468.75 (Jointly owned Sandra Nelson)
4. UMB Checking Account - \$2,483.81 (Jointly owned Sandra Nelson)
5. Kansas City Police Credit Union IRA - \$60,329.11 (Jointly owned/ Sandra Nelson)
6. Kansas City Police Credit Union IRA - \$1,138.14 (Jointly owned/ Sandra

Nelson)

7. American Century Growth Mutual Fund - \$16,208.08 (Jointly owned/
Sandra Nelson)
8. American Century Select Mutual Fund - \$13, 226.21 (Jointly owned/
Sandra Nelson)

The UMB C.D. Payable on Death to Sandra Nelson

The UMB certificate of deposit (#1 above) was opened by Betty Reynolds on August 17, 2009. (Defendants S.O.F 25, L.F. 068, 296). The funds to purchase this C.D. came from Betty Reynolds' since closed KCPCU, Bank of America or AARP accounts (L.F. 296). This fact is not disputed. Betty Reynolds gave Kenneth Nelson a questionnaire in 2000 that listed her holdings (L.F. 135, 294).

The Three (3) UMB Accounts Held Jointly with Sandra Nelson

The UMB Certificate of Deposit #10762641310 (#2 above) was opened April 25, 2008, naming Sandra Nelson as joint tenant. The amount of the initial deposit is not stated on the account card. (Defendants S.O.F. 24, L.F. 067).

The UMB Certificate of Deposition #15295951310 (#3 above) was opened April 24, 2008, with an initial deposit of \$24,000.00. It named Sandra Nelson payable on death beneficiary, but one day later on April 25, 2008, was changed to name Sandra Nelson, as joint tenant with right of survivorship. (Defendants S.O.F. 23, L.F. 067).

The UMB checking account #9837648701 (#4 above) was opened on June 6, 2005, naming Louise Baughman as payable on death beneficiary. The initial deposit was \$5,985.00. On July 20, 2006, Betty Reynolds removed Louise Baughman as payable on

death beneficiary and named Sandra Nelson as joint owner. (Defendant's S.O.F. 21, 22; L.F. 067).

All of the UMB bank accounts were created from funds obtained from the closing of other accounts from other banking institutions, largely KCPCU, and possibly a checking account at Bank of America, which was listed on a statement of assets Betty Reynolds provided Ken Nelson in 2000 which listed all of her cash holdings. (Defendant's S.O.F. 10, L.F. 065).

When Betty Reynolds died, she did not own accounts at Bank of America, AARP Scudder or KCPCU accounts 6144 or 61422. (Defendant's S.O.F. 17, L.F. 066).

The KCPCU Account

At the time of her death, Betty Reynolds owned account #64120 at KCPCU (#5 and #6 above). This account was jointly opened in April 2000 and named Louise Baughman as payable on death beneficiary. (Defendant's S.O.F. 11; L.F. 065). On July 10, 2006, twelve days after signing her will under date of June 28, 2006, Betty Reynolds removed Louise Baughman, and added Sandra Nelson as joint tenant. (Defendant's S.O.F. 20; L.F. 067).

The American Century Brokerage Accounts

Prior to April 29, 2008, Betty Reynolds owned two brokerage accounts (#7 and #8 above) with American Century Investments, held jointly with Louise Baughman. On April 29, 2008, Betty Reynolds removed Louise Baughman as joint tenant, and added Sandra Nelson, as joint tenant. (Defendant's S.O.F. 18, 19; L.F. 067).

The assets and form of ownership on the date of Betty Reynolds' death on April

28, 2010 can be summarized as follows:

PAYABLE ON DEATH ACCOUNT

	Asset	Ownership at Death	Origin
UMB CD #1471864131	\$202,916.99	P.O.D. Sandra Nelson	Transfer from KCPCU

JOINTLY HELD ACCOUNTS

	Asset	Ownership at Death	Origin
UMB CD #10762641310	\$118,684.86	Joint/Sandra Nelson	Transfer from KCPCU
UMB CD #15295951310	\$41,468.75	Joint/Sandra Nelson	Transfer from KCPCU
UMB CA #9837648701	\$2,483.81	Joint/Sandra Nelson	POD Louise Baughman
KCPCU IRA	\$60,329.11	Joint/Sandra Nelson	POD/Louise Baughman
KCPCU IRA	\$1,138.14	Joint/Sandra Nelson	POD/Louise Baughman

JOINTLY HELD BROKERAGE ACCOUNTS

	Asset	Ownership at Death	Origin
American Century Growth	\$16,208.08	Joint/Sandra Nelson	Joint/Louise Baughman
American Century Growth	\$13,226.21	Joint/Sandra Nelson	Joint/Louise Baughman

Appellant filed suit against Kenneth Nelson and Sandra Nelson. Pursuant to appellant's second amended petition (L.F. 020) the following claims were asserted:

- a. Discovery of assets pursuant to section 473.340 RSMo. for the estate of Betty Reynolds;
- b. Seeks to set aside the accounts acquired by Sandra Nelson (and her husband Kenneth Nelson) by undue influence;

- c. Asks that a constructive trust be placed on the accounts acquired by Sandra Nelson (and her husband Kenneth Nelson);
- d. Asserts a claim of legal malpractice against Kenneth Nelson;
- e. Asserts a claim of breach of fiduciary duty against Kenneth Nelson.

Respondents filed their motion for summary judgment (L.F. 058, 306) alleging that plaintiff is barred from pursuing any of his claims because he was not listed as a named beneficiary on any of the subject accounts, and therefore lacked standing, citing the court to Crocker v. Crocker, 261 S.W.3d 724 (Mo. App. W.D. 2007) (L.F. 297).

Appellant filed his Response to Respondents' Motion for Summary Judgment. (L.F. 335, 610).

On December 14, 2012, the trial court heard arguments concerning the respondents' motions for summary judgment and appellant's response thereto. On January 2, 2013 the trial court entered its judgment dismissing all of appellant's counts contained in his second amended petition, finding that "appellant had suffered no harm and had no right to pursue any of his claims", relying on Crocker v. Crocker, Id. (L.F. 706, A-1).

Appellant appealed from the summary judgment granted to respondents Kenneth Nelson and Sandra Nelson to the Missouri Court of Appeals, Western District.

The Missouri Court of Appeals, Western District reversed in part, the trial court's grant of summary judgment. The Western District held that Appellant had standing to claim three UMB Bank accounts held by decedent, that were payable on death or jointly held with Respondent Sandra Nelson, were obtained by undue influence, and that they

should be impressed with a constructive trust and held as assets in the estate of Decedent Betty Reynolds, upon a showing they were obtained by undue influence.

The Western District also held that Appellant had standing to pursue his claims of legal malpractice and breach of fiduciary duty against Respondent Kenneth Nelson.

This court granted transfer by its order of April 29, 2014.

POINTS RELIED ON

POINT I

The Western District Court of Appeals correctly held that appellant has standing to pursue his claim that three UMB Bank certificates of deposit were obtained by Sandra Nelson by undue influence of Sandra Nelson and Kenneth Nelson.

Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d

596, 598 (Mo. banc 2001)

Carrol v. Hahn, 498 S.W.2d 602, 607 (Mo. App. 1973)

Hammack v. Coffelt Land Title, Inc., 348 S.W.3d 75

(Mo. App. W.D. 2011)

Section 461.033(5) RSMo.

POINT II

The Western District Court of Appeals correctly held that appellant had standing to pursue his claim for legal malpractice and breach of fiduciary duty against respondent Kenneth Nelson. General damages proveable as a result of these claims are not limited to the subject accounts owned by the late Betty Reynolds.

Donohue v. Shugart Tompson & Kilroy, P.C., 900 S.W.2d 624 (Mo.

banc 1995)

Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997)

POINT III

The Western District Court of Appeals properly held that Appellant had standing to pursue all claims, subject to proof at trial.

ITT Commercial Fin. Corp. v. Mid-American Marine Supply

Corp., 854 S.W.2d 371 (Mo. banc 1993)

First Nat'l Bank of St. Charles v. Chemical Products, Inc., 637

S.W. 2d 373, 375 (Mo. App. E.D. 1982)

Duerbusch v. Karas, 267 S.W.3d 700 (Mo. App. E.D. 2008)

In Re: Estate of Goldschmidt, 215 S.W.3d 215 (Mo. App. E.D.

2006)

POINT IV

The Western District Court of Appeals correctly held that appellant had standing to pursue his equitable claim that a constructive trust be imposed on the bank accounts and investments owned by the late Betty Reynolds, because it is an equitable claim to impose justness and fairness to set aside the product of undue influence, abuse of a confidential relationship or unjust enrichment.

Brown v. Brown, 152 S.W.3d 911 (Mo. App. W.D. 2005)

Lynch v. Lynch, 260 S.W.3d 834 (Mo. Banc 2008)

ARGUMENT

STANDARD OF REVIEW

In reviewing a grant of summary judgment, the entire record is to be examined to determine whether there is any issue of material fact and whether the moving party was entitled to judgment as a matter of law. Dial v. Lathrop R-II School Dist., 871 S.W.2d 444 (Mo. banc 1994).

The propriety of summary judgment is an issue of law, and the review is de novo. The record is reviewed in the light most favorable to the party against whom summary judgment was entered. The non-movant is entitled to the benefit of all reasonable inference from the record. ITT Commercial Fin. Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993).

POINT I

The Western District Court of Appeals correctly held that appellant has standing to pursue his claim that three UMB Bank certificates of deposit were obtained by Sandra Nelson by undue influence of Sandra Nelson and Kenneth Nelson.

The Court of Appeals correctly found that appellant had standing to pursue his claims that three UMB Bank certificates of deposit were obtained by the undue influence of Kenneth and Sandra Nelson. The Court of Appeals properly held that the trial court's reliance on Crocker v. Crocker, 261 S.W.3d 724 (Mo. App. W.D. 2007) was misplaced, overly broad, and therefore erroneous.

For purposes of clarity, the status of the accounts on the date of Betty Reynolds

death, are set forth here again.

1. UMB Certificate of Deposit #1471864131 - \$202,916.99 (Payable on death Sandra Nelson)
2. UMB Certificate of Deposit #10762641310 - \$118,684.86 (Jointly owned Sandra Nelson)
3. UMB Certificate of Deposit #15295951310 - \$41,468.75 (Jointly owned Sandra Nelson)
4. UMB Checking Account - \$2,483.81 (Jointly owned Sandra Nelson)
5. Kansas City Police Credit Union IRA - \$60,329.11 (Jointly owned/ Sandra Nelson)
6. Kansas City Police Credit Union IRA - \$1,138.14 (Jointly owned/ Sandra Nelson)
7. American Century Growth Mutual Fund - \$16,208.08 (Jointly owned/ Sandra Nelson)
8. American Century Select Mutual Fund - \$13,226.21 (Jointly owned/ Sandra Nelson)

Chapter 461 RSMo., known as The Nonprobate Transfer Law, only pertains to one of the eight (8) investment accounts at issue in this case. The UMB Certificate of Deposit account (#1 above) for \$202,916.99 was the only investment that was payable on death to Sandra Nelson.

Prior to the purchase of UMB CD#1, Decedent had funds in various accounts, some of which were in the Kansas City Police Credit Union. Those earlier accounts were

closed and any joint ownership or beneficiary designations were extinguished. Some of the funds from the closed accounts were used to purchase UMB CD#1.

The UMB Certificate of Deposit (#1 above), payable on death to Sandra Nelson, was “new money” in that this was a new account in a different institution and not merely a change of a beneficiary designation or an addition of a joint owner.

The trial judge indicated she did not believe that moving funds from one banking institution to another was a transfer subject to 461.033(5) RSMo.; therefore, even if plaintiff was successful in setting aside the subject certificate of deposit due to undue influence, she surmised that the account ownership would revert to its prior ownership status in the prior banking institution. (TR 13).

Due to the fungibility of money, many times it would be absolutely impossible to determine from what source or sources a certain deposit came and in what amount or amounts. It may have come from one or more accounts, all held in different ownership, in one or more banking facilities.

The legislature was aware of this problem. Section 461.033(5) RSMo. cures this problem by stating that closing an account in one banking institution and opening it in another terminates any prior beneficiary designations. Therefore, if appellant is successful in setting aside the above referenced UMB Certificate of Deposit, it would not revert to prior ownership as designated in one or more possible other banking institutions, but would be an asset of the estate of Betty Reynolds.

Crocker v. Crocker, 261 S.W.3d 724 (Mo. App. W.D. 2008) is not applicable to the present fact situation involving UMB CD's 1, 2 and 3. Crocker involved a sequence

of beneficiary deeds to real estate. This court observed that if the plaintiff in Crocker was successful in setting aside the contested beneficiary deed for undue influence, that beneficiary deed would be revoked as void and of no legal effect. This court further reasoned that if the contested beneficiary deed were void, then a prior beneficiary deed would then be the operative instrument concerning the real estate title.

The governing case on the instant facts is a case decided after Crocker, which is Hammack v. Coffelt Land Title, Inc., 348 S.W.3d 75 (Mo. App. W.D. 2011). Hammack again involved a sequence of real estate deeds, but this court in Hammack stated:

“a transfer during the owners’ lifetime of the owner’s interest in the property terminates the beneficiary designation with respect to the property transferred. § 461.033.5 RSMo. Therefore, the beneficiary deed that was executed by Stanley and Jeannette Hammack and that conveyed title in Stanley Hammack’s one half interest in the farm to the Farm Trust via the Family Trust was terminated... when Stanley and Jeannette Hammack and Thomas and Janet Hammack transferred title by the general warranty deed held in escrow by Coffelt Land Title.”

“If the money is withdrawn from the account, the account is closed or if the property is sold, the gift is extinguished by ademption.” J. Borron, 4A MO. PRACTICE, Probate and Surrogate Laws Manual §461.033 (2012 ed.).

There is no dispute that the earlier accounts; including KCPCU and Bank of America were closed, thus terminating any joint ownership or beneficiary designations. If it is later proved that Sandra Nelson was added to the UMB CD’s as a joint owner or a

beneficiary because of undue influence, the account would belong to the estate of Betty Reynolds for which appellant Eric Williams is a legatee under the will of Betty Reynolds,

The Court of Appeals also correctly held that appellant had standing to challenge two UMB Bank certificates of deposit of the late Betty Reynolds that were held jointly with Sandra Nelson. These accounts are numbered 2 and 3 in the table of assets and are governed by section 362.470 RSMo.

Section 362.470 RSMo. states “*in the absence of fraud or undue influence*, the establishment of a joint account shall be conclusive evidence in any action or proceeding to which either the bank or trust company or any survivor is a party”. (emphasis added)

It is noteworthy that this section does not define or declare any account obtained by undue influence to be void. The same reasoning should apply as to joint accounts that section 461.033.5 RSMo. imparts to beneficiary accounts, in that if a jointly held account is determined to have been obtained by undue influence, it should not revert to ownership established earlier in another separate account in another banking institution because the interests of the non-contributing tenant is extinguished by closing of those joint accounts.

The Court of Appeals correctly observed that “any argument that the immediately preceding joint owners on decedent’s closed accounts are automatically entitled to the funds upon a finding of undue influence ignores common law principles regarding the closure of joint bank accounts”. (App. 11).

Missouri law maintains that “[d]uring one’s lifetime, an individual who has deposited all the funds in a joint account has the power to divest the interests of a non-contributing joint tenant by transferring those funds to a new account.” Auffert v.

Auffert, 829 S.W.2d 95, 98 (Mo. App. W.D. 1992) overruled on other grounds by Maudlin v. Lang, 867 S.W.2d 514, 516 (Mo banc 1993); see also Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d 596, 598 (Mo. banc 2001) (stating that “[w]here there is a sole contributor to a jointly held certificate [of deposit], methods to effect an ‘actual termination’ include: cashing the certificate or surrender of the certificate by the sole contributor and the issuing of a new certificate in his name alone or in the name of a third party”): Carrol v. Hahn, 498 S.W.2d 602, 607 (Mo. App. 1973) (recognizing that the sole contributor of the funds in a joint account “had the power to revoke the account and appropriate any or all of the funds and to open [a] new account” in order “to divest the interest of a joint tenant”). Thus, the closing of a joint account by the sole contributing tenant typically signifies an intent to divest the noncontributing joint tenant of his or her interest in the account.

Decedent, during her life, closed accounts at KCPCU, Bank of America and AARP, thus terminating any joint ownership or beneficiary designations on those accounts. Some or all of those funds were used to purchase UMB CD’s #2 and 3. Like UMB CD#1, the funds therein would revert back to Decedent’s estate upon a finding of undue influence.

The Court of Appeals correctly reasoned that Appellant had standing, as a matter of law, to seek the imposition of a constructive trust upon the funds in UMB#2 and UMB#3.

POINT II

The Western District Court of Appeals correctly held that appellant had

standing to pursue his claim for legal malpractice and breach of fiduciary duty against respondent Kenneth Nelson. General damages proveable as a result of these claims are not limited to the subject accounts owned by the late Betty Reynolds.

Appellant claims that Ken Nelson improperly failed to advise and discuss the effect of non-probate transfers and jointly held accounts and the effect of a will on non-probate transfers and jointly held accounts in his 2000 representation of Betty Reynolds and again in the 2006 representation of Betty Reynolds. Appellant also claims that Ken Nelson breached his fiduciary duty to Betty Reynolds.

During the 2000 representation, Betty Reynolds furnished Ken Nelson with information showing her accounts and holdings of approximately \$446,000.00 were held jointly with Louise Baughman and Norma Lamp. (Plaintiff's S.O.F. 63, 64, 65; L.F. 375, 376).

The accounts remained unchanged after the 2000 will was signed, and remained unchanged until after the 2006 will was executed.

Ken Nelson knew or had access to the information as to how Betty Reynolds' accounts were owned. He made no inquiry in the 2006 representation. He said in his deposition that Betty Reynolds did not volunteer any update concerning the status of ownership of her accounts and investments, and that he did not ask. (Plaintiff's S.O.F. 74; L.F. 378, 448).

Plaintiff's expert, Professor Francis Hanna, Professor of Law at the University of Missouri at Kansas City School of Law (L.F. 477, 500) gave opinions that Kenneth

Nelson breached the standard of care in his 2006 representation of Betty Reynolds, and was thereby negligent. Professor Hanna's opinions are as follows: (L.F. 500)

1. Negligence.

- A. The defendant's failure to update the client questionnaire, and more particularly obtain a detailed list of client's assets and how there were titled, was below the standard of care.
- B. If, as the evidence suggests, the defendant failed to thoroughly discuss the alternatives of avoiding probate through use of non-probate transfers or a living trust, his conduct was below the standard of care.
- C. The decedent's conduct regarding changing the titles to her accounts, beginning shortly after the will was executed, raises a serious question whether she adequately understood the operation of the durable power of attorney and access to her accounts in the event of her incapacity. It is below the standard of care to fail to discuss and explain these matters to the client with sufficient clarity to assure her understanding of them. Because of a lack of evidence supporting the discharge of this responsibility, the evidence suggests conduct in this regard by the defendant which is below the standard of care. The proper conduct also would have involved a warning not to unilaterally undertake to change the titles without professional advice.

It is clear from the facts in this case that by preparing the 2006 will which left one-half of Betty Reynolds assets to his wife, he breached his fiduciary duty at the time the 2006 will was prepared. It is also abundantly clear he failed to act in the best interest of Betty Reynolds, took action contrary to the best interest of Betty Reynolds, acted in a self interested matter, failed to investigate how the assets of Betty Reynolds were titled and failed to investigate or inquire into the nature of and titling of Betty Reynolds' assets.

Plaintiff's claim of legal malpractice is based upon Donohue v. Shugart Tompson & Kilroy, P.C., 900 S.W.2d 624 (Mo. banc 1995). Donohue expanded the ability of third party non-clients to bring a legal malpractice claim. The Donohue court concluded that the first element of a legal malpractice claim is satisfied when the attorney/defendant performs services specifically intended by the client to benefit the plaintiff. This is to be determined by weighing factors in a modified balancing test. Those factors are:

- (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs;
- (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence;
- (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct;
- (4) the closeness of the connection between the attorney's conduct and the injury;
- (5) the policy of preventing future harm;

- (6) the burden on the profession of recognizing liability under the circumstances.

Damages in legal malpractice claims and/or breach of fiduciary claims are not limited to the subject investment accounts. A jury may determine general damages based on many factors that appellant could prove at trial.

Kenneth Nelson's breach of the standard of care to his client Betty Reynolds resulted in her lack of understanding of the interaction of a will and beneficiary accounts or jointly held accounts. It is clear Betty Reynolds did not understand any of this as he prepared her 2000 will and her 2006 will, and he had all the information at hand to properly advise her, but did not.

Kenneth Nelson's negligence in his representation of Betty Reynolds and lack of proper advice, has now created the respondent's claim of no harm, no foul, or better said, that appellant lacks standing to pursue his claims. It is a strange set of circumstances indeed, where Kenneth Nelson's self interested acts and personal profit, form the basis for the defense of lack of standing.

Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997) recognized a tort of breach of fiduciary duty as a separate and independent claim from legal malpractice.

Appellant's expert, Professor Francis Hanna, gave an opinion that Kenneth Nelson breached his fiduciary duty to Betty Reynolds. His opinions were as follows: (L.F. 500)

2. Breach of fiduciary duty regarding both the will and durable power of attorney.

- A. By drafting these two instruments which directly benefited his wife, defendant was in a position of actual divided loyalties which required very specific handling. Under Missouri law, the benefit to his wife was tantamount to benefit to himself.
- B. Under the standard of care, defendant was obliged to thoroughly explain the nature of the conflict, including reasonable possibilities that could develop, and obtain the client's written, informed consent. In failing to do that, he breached his duty of loyalty to her and set up the conditions by which the estate plan contemplated in her executed will was frustrated.
- C. Because of the intimate nature of the relationship the defendant and his wife sustained with his client, the strength and necessity of the foregoing duties were greater than would have been under normal circumstances involving such conflicts.
- D. To the extent that they were committed in the context of this fiduciary relationship, the negligent acts enumerated above assume a higher degree of responsibility and potential culpability.

One thing is glaringly apparent throughout this entire fact pattern, and that is Betty Reynolds did not understand the difference between a will and payable on death or joint tenancy accounts and Ken Nelson failed to advise her of that fact and also breached his fiduciary duty to Betty Reynolds while watching a scheme unfold that directly benefited his wife, and he and his wife knew it while it was happening.

It is clear that Kenneth Nelson breached his fiduciary duty to Betty Reynolds. Like appellant's claim for negligence against Kenneth Nelson, damages for breach of fiduciary duty are not limited to the subject bank and investment accounts. A jury may determine general damages based on many factors that appellant could prove at trial.

If Kenneth Nelson's negligence or breach of fiduciary duty caused a reduction or elimination of estate assets, then appellant has standing to have his damages determined by a jury, because he is a legatee under Betty Reynolds' will.

POINT III

The Western District Court of Appeals properly held that Appellant had standing to pursue all claims, subject to proof at trial.

The undisputed facts as set forth herein create a presumption of undue influence. Respondents misstate and misinterpret the Western District's opinion in that the Western District properly held that Appellant had standing to pursue his claims subject to proof at trial not merely that Appellant had a "possibility" of standing to pursue his claims.

The record is reviewed in the light most favorable to the party against whom Summary Judgment was entered. The nonmovant is entitled to the benefit of all reasonable inferences from the record. ITT Commercial Fin. Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993).

Summary judgment is a drastic remedy and is therefore inappropriate unless the prevailing party has shown by unassailable proof to be entitled thereto as a matter of law. First Nat'l Bank of St. Charles v. Chemical Products, Inc., 637

S.W. 2d 373, 375 (Mo. App. E.D. 1982).

The Court of Appeals correctly reasoned that appellant could maintain his causes of action pertaining to three UMB bank accounts. The Court of Appeals also correctly ruled that the trial courts grant of summary judgment as to appellants claims of legal malpractice and breach of fiduciary duty was also erroneous.

The trial court never got to the point of considering the quantum and quality of the evidence.

In the trial judge's own words, she declined to consider any evidence. (TR. 3)

MR. BONUCHI: Like I said the undisputed evidence doesn't support the judgment in plaintiff's favor on any of the five counts.....

THE COURT: Let's focus on standing. I think that's really what the issue is, for starters. If we get past standing we can talk about other things, but I think standing is the big issue here.

Although, respondents maintain appellant lacks standing, a discussion of the evidence and requirements to prove undue influence is in order.

Undue influence occurs when a party in a position of trust induces the other by active conduct to provide a substantial benefit through the transfer of property.

Duerbusch v. Karas, 267 S.W.3d 700 (Mo. App. E.D. 2008). A presumption of undue influence arises where the evidence shows (1) a confidential and fiduciary relationship; (2) that the fiduciary obtained a benefit; and (3) some additional evidence from which

there is an inference of undue influence. Duerbusch, Id.; In Re: Estate of Goldschmidt, 215 S.W.3d 215 (Mo. App. E.D. 2006).

When a presumption of undue influence is supported by substantial evidence, a submissible case is made and the case should go to the jury even if there is contrary evidence. Duerbusch, Id., Goldschmidt, Id.

The first prong of the undue influence presumption involves a confidential or fiduciary relationship. At all pertinent times herein, Ken Nelson was the attorney for Betty Reynolds. In 2006, Ken Nelson prepared a durable power of attorney for Betty Reynolds that appointed his wife, Sandra Nelson, her durable power of attorney. Both Nelsons also claimed a close familial relationship to Betty Reynolds. They referred to Betty as a second mother. Betty conferred with Sandra about her personal business. This prong of the test is unquestionable.

To establish the second prong of the undue influence presumption, plaintiff must show that the fiduciary obtained a benefit from his or her position of trust. Since Sandra Nelson was the survivor on all of Betty Reynolds valuable assets to the tune of approximately \$456,455.00, represented by certificates of deposit and other investment accounts, it goes without saying that the Nelsons received a substantial benefit.

To establish the third prong, there must be some additional evidence from which undue influence may be inferred. This evidence may consist of the physical condition of the asset holder, as well as evidence that the fiduciary has the power to influence the holder and opportunity to do so, and the disposition of property was a changed course of action. Missouri courts view the amount of evidence necessary to satisfy this third prong

liberally. (Emphasis added) Duerbusch, Id., Goldschmidt, Id.

There is evidence that Betty Reynolds was in a declining state of health the last four or five years of her life.

According to the testimony of Betty Reynolds' lifelong friend Louise Baughman, who saw her daily the last four years of her life, Betty was under the influence of Ken Nelson and Sandra Nelson, and would have done anything Ken Nelson told her to do. (Plaintiff's Statement of Facts 104, 105; L.F. 381, 409, 410)

Betty Reynolds' cousin, Vera Kerr, who talked with Betty on the phone almost daily the last four years of her life, said she watched Betty spiral down into a state of dementia, and Nelsons slowly took control of her estate, and that Betty did not comprehend what was happening. (Plaintiff's Statement of Facts 90, 91, 92; L.F. 380, 394, 396).

Lastly, Betty Reynolds began a sequence of changing all of her deposits into a survivorship status with Sandra Nelson, within a few days after executing her last will and testament, a last will and testament that she agonized over and took several weeks to communicate with Ken Nelson concerning her wishes to be expressed in her last will and testament. It goes without saying that there was a drastic change in the course of the disposition of Betty Reynolds' property. These changes totally negated the terms of the will that she had just signed, that favored Appellant with one-half of her estate.

Betty Reynolds asked appellant to come visit her in Kansas City and he did in September 2009. Betty told him he was getting one-half of her money, and that she had taken the old people off and put a younger person on with him. (Plaintiff's S.O.F. 137,

144; L.F. 387, 388).

At the time of this meeting, Sandra Nelson was already the named beneficiary on all of Betty Reynolds accounts. It is obvious Betty Reynolds suffered under a common misconception that a will trumps account ownership.

The exercise of undue influence is often proved by circumstantial evidence. Duerbusch, Id., Goldschmidt, Id. “Persons exerting undue influence will do so in a subtle, furtive, indirect and elusive manner as possible and such influence therefore may be shown indirectly by the reasonable and natural inferences drawn from the facts and circumstances proved.” Estate of Groves, 840 S.W. 2d 253 (Mo. App. E.D. 1992) Duerbusch v. Karas, Id.

These facts create a presumption of undue influence based on the foregoing analysis. The facts should be verified and evaluated by a jury. The entry of summary judgment by the trial court was in error. The Court of Appeals correctly observed, that appellant has standing to make the case of undue influence, if he can prove it. Based on the foregoing, appellant can make a prima facie case.

POINT IV

The Western District Court of Appeals correctly held that appellant has standing to pursue his equitable claim that a constructive trust be imposed on the bank accounts and investments owned by the late Betty Reynolds, because it is an equitable claim to impose justness and fairness to set aside the product of undue influence, abuse of a confidential relationship or unjust enrichment.

A constructive trust may be defined as the device used by chancery to compel one

who unfairly holds a property interest to convey that interest to another to whom it justly belongs. A constructive trust is to provide a remedy in cases where one “has acquired property under such circumstances as make it inequitable for him to retain it”. Brown v. Brown, 152 S.W.3d 911 (Mo. App. W.D. 2005).

A constructive trust is the formula through which the conscious of equity finds expression when property has been acquired in such circumstances that the holder of the legal title may not in good conscious retain the beneficial interest, equity converts him into a trustee. Brown, Id.

The holding in Brown expanded the concept of constructive trust in that the prior line of cases required a showing of actual or constructive fraud or a breach of a confidential or fiduciary relationship, undue influence or some other wrongful or tortuous conduct by the defendant.

While it is certainly true the constructive trust may arise in such cases, it is not true that a constructive trust may arise only under those circumstances. Brown, contains a good discussion of constructive trusts and is cited and approved by Lynch v. Lynch, 260 S.W.3d 834 (Mo. Banc 2008).

The touchstone for imposition of a constructive trust is injustice or unfairness which may take the form or view the product of actual or constructive fraud, abuse of a fiduciary confidential relationship or undue influence or unjust enrichment.

The trial court erred in dismissing the equitable claim for constructive trust, based on the trial court’s finding that appellant lacked standing.

CONCLUSION

The opinion of the Western District Court of Appeals should be affirmed and remanded with directions to proceed with trial on the merits.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this Appellant's Substitute Brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); (3) contains 7,155 words, exclusive of the Sections exempted by Rule 84.06(b)(2) of the Missouri Rules of Civil Procedure based on the word count that is part of Microsoft Word and (4) contains 1,011 lines of monospaced type based on the line count that is part of Microsoft Word.

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CERTIFICATE OF ELECTRONIC FILING

I, hereby certify that on May 16, 2014, a copy of Appellant's Substitute Brief was electronically filed with the Office of the Clerk of the Supreme Court of Missouri using the CM/ECF system which sent notification of such filing to the following attorneys of record:

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